Supreme Court, U.S.
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No. 92-1644

In The

Supreme Court of the United States

October Term, 1992

WOODBURY PLACE PARTNERS,
a Minnesota General Partnership,

Petitioner,

vs.

CITY OF WOODBURY, a Minnesota
Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari To The State Of Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*Robert H. Freilich
Richard G. Carlisle
Freilich, Leitner & Carlisle
1000 Plaza West
4600 Madison
Kansas City, Missouri 64112
(816) 561-4414

Pierre N. Regnier
James G. Golembeck
Jardine, Logan & O'Brien
2100 Meritor Tower
444 Cedar Street
St. Paul, Minnesota 55101
(612) 290-6500

Attorneys for Respondent

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Counsel for Respondent suggest that the question presented by Petitioner is a misstatement of the Question Presented in this case. Pursuant to Rule 24.2 of the Supreme Court Rules, Respondent respectfully offers the following Question Presented:

> IF A DEVELOPER AND GOVERNMENTAL BODY STIPULATE THAT TEMPORARY DENIAL OF ALL ECONOMICALLY VIABLE USE IS REASONABLE IN SCOPE AND DURATION - AND WHERE THERE IS NO EVIDENCE OF TEMPORARY OR PERMANENT ECONOMIC HARM OR DIMINUTION IN VALUE - DOES THAT CONSTITUTE A *PER SE* TAKING UNDER *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*, ___ U.S. ___, 112 S.Ct. 2886 (1992)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

SUMMARY OF THE ARGUMENT 6

The Decision Of The Minnesota Court Of Appeals Does Not Raise An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

1902 Atlantic Limited v. United States, 26 Cl. Ct. 575 (1992) 10

Agins v. City of Tiburon, 447 U.S. 255 (1980) 5, 6, 10, 11

Bell v. City of Waco, 835 S.W.2d 211 (Tex. Ct. App. 1992) 10

Berrios v. City of Lancaster, 798 F.Supp. 1153 (E.D. Pa. 1992) 13

Danforth v. United States, 308 U.S. 271 (1939) 10

Dufau v. United States, 22 Cl. Ct. 156 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir. 1991) 11

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 10

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) 11, 12, 14

Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) 13

Guinane v. City and County of San Francisco, 197 Cal. App. 3d 862, 241 Cal. Rptr. 787 (1987) 12

Jackson Court Condominiums v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) 11

Lockary v. Kayfetz, 908 F.2d 543 (9th Cir. 1990) *rehearing denied* 917 F.2d 1150 (9th Cir. 1990) 11

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886 (1992) 1, 3, 4, 12, 13

McAndrews v. New Bank of New England, 796 F.Supp. 613 (D. Mass. 1992) 13

TABLE OF AUTHORITIES – Continued

Page

McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Auth. Dist., 580 N.E. 2d 339 (Ind. App. 1991) 11

Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F.Supp. 1068 (M.D.N.C. 1992) 13

New Jersey Shore Builders Assoc. v. Township of Middletown, 561 A.2d 319 (N.J. A.D. 1989) 12

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 10

Powers v. Skagit County, 835 P.2d 230 (Wash. Ct. App. 1992) 13

S.E.W. Friel v. Triangle Oil Co., 543 A.2d 863 (Md. 1988) 11

Schafer v. City of New Orleans, 743 F.2d 1086 (5th Cir. 1984) 11

Smith v. Wolfeboro, 615 A.2d 1252 (N.H. 1992) 10

Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (1992) 13

Tocco v. N.J. Council on Affordable Housing, 576 A.2d 328 (N.J. 1990), *cert. denied*, 122 N.J. 403, 585 A.2d 401 (N.J. 1990), *cert. denied*, 111 S.Ct. 1389 (1991) 12

Tull v. Commonwealth of Virginia, ___ U.S. ___, 113 S.Ct. 191 (1992) 5

Zilber v. Town of Moraga, 692 F.Supp. 1195 (N.D. Cal. 1988) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND ARTICLES

Bozung & Alessi, *Recent Developments in Environmental Preservation and Rights of Property Owners*, 20 Urb. Law. 969 (1988) 8

D. Callies & C. Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 Urb. L. Ann. 73 (1974) 7

Michelman, *Property, Utility and Fairness: Commentson the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 8, 9

Minn. Stat. § 462.355(4) (1990) 3

Sax, *Takings in the Police Power*, 74 Yale L. J. 36 (1964) 8, 9

Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 Vermont L. Rev. 193 (1984) 8, 10

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Petition For Writ Of Certiorari To The State Of Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully asks that the Writ of Certiorari requested by Petitioner be denied.

STATEMENT OF THE CASE

Petitioner states that the City's 24 month interim development moratorium "denies a property owner of all economically viable use of its property . . . " constituting a per se categorical taking of property under this Court's recent decision in *Lucas v. South Carolina Coastal Council,*

___ U.S. ___, 112 S.Ct. 2886 (1992). Petition pg. 3. Contrary to Petitioner's assertion, the parties in this case stipulated that denial of all economically viable use for two years was reasonable in scope and duration. (Stipulated Findings, [Petitioner's Version], No. 47; and, Stipulated Findings, [Respondent's Version], Nos. 124 and 125). Further, there was no stipulation or evidence in this case of economic harm or diminution in *the temporary or permanent value* of the developer's property caused by the moratorium.

In 1980, the City's Comprehensive Plan identified the need for access to Interstate 494 (I-494) in the vicinity of property owned by Douglas and Steven DeCoster. In 1987, Petitioner purchased an undivided one-half interest in the DeCoster land[1]. In early 1988, a transportation consultant reported that traffic safety problems caused by growth in the area would seriously worsen traffic congestion and recommended that several new interchanges be constructed to accommodate existing and future traffic demands. (Defendant's Findings Nos. 15, 16). In accordance with law, a period of study, negotiations and discussions with over 40 federal, state, regional and local agencies commenced regarding amendment of the City's

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[1] Contrary to Petitioner's Statement of the Case, Petitioner has not been the owner of the Property here involved at all relevant times. Twenty months after enactment of the moratorium (while the interim ordinance was still in effect), Petitioners purchased the DeCosters' remaining interest in the land. Moreover, in January 1991 Petitioners sold the Property to a third party for an undisclosed sum. (Plaintiff's Findings, Nos. 3-6).

Comprehensive Plan to provide new access to I-494. Careful study of impacts of the project on nearby elementary and junior high schools, on adjacent wetlands, traffic safety and capacity, church property (among many other issues) ensued. (Defendant's Findings, Nos. 11, 31, 39, 40, 44, 45, 54, 57, 65, 72, 74, 77).

To prevent premature development during the studies and environmental assessments, which might destroy and frustrate the proper implementation for the health, safety and welfare of the corridor intersection location, the City enacted Ordinance No. 1516 to impose a temporary moratorium on development in the I-494 corridor which would have a negative impact on the planning process. Ordinance No. 1516 was expressly authorized by Minn. Stat. § 462.355(4) (1990) which provided for such moratoria for a period not to exceed 30 months.[2] Pursuant to the mandates of state law and by its own terms, the interim moratorium ordinance expired on March 23, 1990. During the study period, the final alignment for the new interchanges and access roads was fully planned and improved the access along the westerly edge of Petitioner's Property. (Defendant's Findings, No. 95).

The parties stipulated that: (1) Petitioner was necessarily and reasonably denied all economically viable use

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[2] Originally, Petitioner challenged the constitutionality of this statute, but later abandoned the claim. The City suggests that abandonment of that claim moots any viable challenge to a moratorium authorized by that statute. (Defendant's Findings, Nos. 115, 121). This is particularly true where the existence of that statute on the date Petitioner acquired the property defined Petitioner's property interest. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2899-2901 (1992).

of its property for two years as a result of the moratorium; (2) Petitioner was not singled out under the moratorium (Defendant's Findings Nos. 110, 114, 115, 118, 119, 121, 123, 124 and 125; and Plaintiff's Findings No. 47); (3) the ordinance was enacted properly and in conformance with all statutes and ordinances. (Defendant's Findings No. 111); (4) the ordinance was of limited duration, enacted in good faith, without discrimination and was not improperly prolonged (Defendant's Findings No. 114); (5) the moratorium was necessary for coordination between all of the governmental agencies involved in the studies from 1986 to 1991 (Defendant's Findings No. 118); (6) the ordinance was necessitated by a large traffic study directly related to the Comprehensive Plan of the City, and was directly related to official controls of the City, such as zoning maps, transportation maps, site plan review, and plat applications; and (7) the ordinance was necessary to protect the public health, safety and welfare (Defendant's Findings No. 125).

Petitioner sought an Alternative Writ of Mandamus in July 1988, compelling Respondent to institute condemnation proceedings. The district court ordered the Respondent to institute condemnation proceedings. On appeal, the Minnesota Court of Appeals noted that Petitioner had totally and simply relied on a stipulation that the ordinance denied all economically viable use of the property for two years; and, that such stipulation was significantly different from the concept of deprivation of "all economically viable use" as applied in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2890 (1992). (App. A-31). The Court further held:

> The two-year deprivation of economic use is qualified by its defined duration. In Minnesota, moratoriums on development to aid planning processes cannot exceed 30 months. Minn. Stat. § 462.355, subd. 4 (1990). This is significantly different from the presumptively permanent South Carolina regulation which imposed prohibitions on development.

(App. A-31-32).

> When measured against the value of the property as a whole rather than only a two year time frame, the moratorium did not deny the partnership "all economically viable use" of its property. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings.[3]

(App. A-33-34) (citing *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 2143 n.9, 65 L.Ed.2d 106 (1980)).

Thus, the Court of Appeals held that Petitioner's economically viable use was merely delayed, rather than taken. (App. A-32).

Accordingly, the Court held that the City's moratorium did not deny Petitioner "all economically viable use" of their property in the way that phrase has been conceived and applied by the Supreme Court; and,

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[3] Following the decision in *Lucas*, this Court denied certiorari in the case of *Tull v. Commonwealth of Virginia*, ___ U.S. ___, 113 S.Ct. 191 (1992), which squarely presented the question of whether a taking inquiry may focus on a portion of the property regulated as opposed to the property as a whole.

remanded for further consideration of this case under the ad-hoc multi-factor standards established in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

The case is currently pending on remand and no opinion by Minnesota's state court of last resort on the remand has yet been issued.

REASONS FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

Pursuant to Rule 10 of the Supreme Court Rules, strong considerations exist in this case to *deny* review on Writ of Certiorari. There is no conflict on the issue here involved in the circuits. There has been no decision by Minnesota's state court of last resort which in fact, refused a writ of review. This case itself is inchoate in that it is currently still being litigated in the state courts. The intermediate decision in this case is not in conflict with any decision of the U.S. Supreme Court or, for that matter, with any other federal decision. A review of the Petition for Writ of Certiorari shows that no claim is made by Petitioner to the contrary.

Instead, Petitioner seeks to bootstrap a phrase, which in and of itself has no meaning, from one of many stipulations in this case. Petitioner's version of the stipulated findings of fact in this case was to the effect that the moratorium here involved denied Petitioner "all economically viable use of the Property for two years." (Petition, pg. 7; Petitioner's Findings, No. 47). In every proceeding in this case, Petitioner has sought to elevate the semantics

of this one phrase, standing alone, over the substance of all of the stipulations taken together.

Reduced to its simplest terms, Petitioner's argument has always been that the phrase "all economically viable use . . . for two years" has some talismanic effect upon its cause of action. It matters not, according to Petitioner, whether or not the *value* of the Property diminished[4] during the period of time the moratorium was in effect, only that the *use* was affected for the two years.

Because this case was submitted on stipulations which, when taken together, establish that the temporary denial of use (a) was reasonable in duration and scope, (b) caused no economic harm, and (c) caused no diminution in value of the Property, this case presents no important question of federal law which has not been, but should be, settled by this Court.

The Decision Of The Minnesota Court Of Appeals Does Not Raise An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This case involves careful transportation planning for new access to an interstate highway. At this stage of the proceedings, the record does not reveal whether or not

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[4] *See* D. Callies & C. Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 Urb. L. Ann. 73, 74 (1974) ("privately-owned land near transit stations and stops will probably increase in value due to the enhanced commercial, industrial and residential development potential created by superior access and the concurrent generation of intense local activity.")

economic harm or windfall profits to the developer were the result of that planning. To date, the record in the case at hand reveals only a temporary interference with the *use* of the Property. There has been no showing of the impact of the ordinance on the *fair market value* of the Property or the extent to which the ordinance interfered with the Petitioner's reasonable investment-backed expectations.

The record does reveal that the Petitioner reaped the economic benefits of improved access in the I-494 corridor and that the Petitioner was able to sell its property during the moratorium for an undisclosed sum (presumably for a profit). (Petitioner's Findings Nos. 3-6). The parties have stipulated that the temporary denial of all economically viable use here involved was reasonable in scope and duration. (Respondents' Findings Nos. 95, 110, 111, 114, 115, 118, 119, 121, 123, 124 and 125; and, Petitioner's Findings No. 47).

Beyond peradventure, there is no "great debate" as to the constitutionality of an ordinance under the Fifth Amendment which creates windfall profits for a developer and is not unfair or arbitrary. Petitioner cites Sax, *Takings in the Police Power,* 74 Yale L. J. 36, 60 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1192 (1967); Bozung & Alessi, *Recent Developments in Environmental Preservation and Rights of Property Owners,* 20 Urb. Law. 969 (1988); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 Vermont L. Rev. 193 (1984) in an attempt to show the dimensions of a debate on the issues involved in this case.

In fact, a review of the sources cited reveals from Petitioner's own authorities that no debate exists over the Question Presented when the stipulations are read as a whole. *See* Question Presented, *supra*.

For example, Professor Sax states:

> The more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government. Story, for example, stated that the compensation provision, "is laid down by jurists as a principle of universal law [because] in a free government, almost all other rights would become worthless, if the government possessed an *uncontrollable* power over the private fortune of every citizen."

Sax, 74 Yale L.J. at 60 (citations omitted) (emphasis in original). By stipulation in the case at hand, we know that the ordinance was not "unfair or arbitrary" and that it did not have an adverse impact upon the "private fortune" of the Petitioner.

Professor Michelman, with language that foreshadowed *Lucas* stated:

> Is the supposedly critical factor the size of the private loss absolutely, or rather the size of that loss compared with some other quantity? And if, as seems clear, a comparison of magnitudes is intended – a comparison in which, were it fractionally expressed, the loss in value of the affected property would compose the numerator – what value supplies the denominator? Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?

Michelman, 80 Hav. L. Rev. at 1192 (1967).

Thus, Professor Michelman speaks of value (not mere temporal use disassociated from value) as the key concept in the equation. This case involves no evidence of diminution in value or economic harm; therefore, it can shed no light on any great debate as to what proportion of value in property may be destroyed by government regulation without payment of just compensation. Compare *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-126 (1978) (showing of "economic harm" not merely a lack of economic use required).

Similarly, the Bozung article and the *White River Junction Manifesto* merely emphasize that fluctuations in value caused by reasonable delays in governmental decision-making do not constitute takings[5]. In the case at hand, we do not know whether value fluctuated or not; however, we do know that the delay in economically viable use was reasonable.

There is certainly no "great debate" about whether or not the separation of powers doctrine still exists; and, as long as it does, municipal legislation, including the ordinance here at issue, will enjoy a presumption of validity. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Likewise, there is no debate that the taking question "necessarily

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[5] "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9 (1980) (citing *Danforth v. United States*, 308 U.S. 271, 285) (remaining citations omitted). *Accord 1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575 (1992); *Smith v. Wolfeboro*, 615 A.2d 1252 (N.H. 1992), and *Bell v. City of Waco*, 835 S.W.2d 211, 215 (Tex. Ct. App. 1992).

requires a weighing of private and public interests." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). Petitioner, by failing to submit evidence of economic harm, clearly did not raise any issue over which there could be much debate.

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) and, *Lucas*, 118 S.Ct. 2886, do not stand for the propositions presented in this petition and, do not rescue Petitioner from its failure to meet its burden. *First English* reached merely the "remedial question" of whether or not the Fifth Amendment mandated the payment of just compensation in the event that there was a temporary taking. 482 U.S. at 303, 312-313. After remand, as we respectively suggest should be the case here, the Supreme Court denied certiorari where the ultimate issue and question presented was whether a reasonable delay in use could be a taking[6].

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[6] This fact is borne out by the decision of the California Court of Appeals in the *First English* remand, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990). There the court found that, on balance, the moratorium was reasonable and therefore not a taking. *First English*, 210 Cal. App. 3d at 1367-69, 258 Cal. Rptr. at 902-03. Following this Court's opinion in *First English*, many courts have upheld validly enacted development moratoria and interim development ordinances against taking challenges. *See e.g., Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989); *S.E.W. Friel v. Triangle Oil Co.*, 543 A.2d 863 (Md. 1988); *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984); *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), *rehearing denied*, 917 F.2d 1150 (9th Cir. 1990); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Auth. Dist.*, 580 N.E. 2d 339 (Ind. App. 1991); *Dufau v. United States*, 22 Cl. Ct. 156 (1990), *aff'd*, 940 F.2d

Lucas, contrary to Petitioner's assertions, did not somehow invite re-examination of the settled issue that taking claims do not arise when reasonable legislation is passed that has no discernable impact on the value of property. Repeatedly, throughout his opinion, Justice Scalia emphasized the draconian prohibitions of the Beachfront Management Act and its "complete extinguishment of property value. . . . " The Act "[r]ender[ed] them valueless." Repeatedly, Justice Scalia made clear that the taking issue was implicated only where legislation rendered property "valueless." 112 S.Ct. at 2895. Justice Scalia refused to entertain any argument (as addressed in the dissents) that "valueless" did not mean "valueless." *Id.* at 2896, n. 9. Finally, in footnote 7, emphasized at page 13 of the Petition, Justice Scalia stated that it is the "loss of *value*" in a given "property interest" that is critical to a determination of whether or not a *per se* taking exists. *Id.* at 2894.

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677 (Fed. Cir. 1991); and *New Jersey Shore Builders Assoc. v. Township of Middletown*, 561 A.2d 319 (N.J. A.D. 1989). Similarly in two specific cases after *First English* this Court has refused to grant certiorari where the question presented squarely raised the issue that a temporary moratorium for periods ranging from eighteen months to five years constituted a compensable taking. *Tocco v. N.J. Council on Affordable Housing*, 576 A.2d 328 (N.J. 1990), *cert. denied*, 122 N.J. 403, 585 A.2d 401 (N.J. 1990), *cert. denied*, 111 S.Ct. 1389 (1991) (moratorium completely freezing land for eighteen months constitutes a temporary taking); *First English*, after remand (five year moratorium until study completed and permanent ordinance adopted constitutes a temporary taking). See also *Guinane v. City and County of San Francisco*, 197 Cal. App. 3d 862, 241 Cal. Rptr. 787 (1987), *cert. denied*, 488 U.S. 823 (1988).

Perhaps another day in another case as the circuits continue to apply *Lucas* a case may come before this Court where property was rendered temporarily "valueless" and where the regulation was not limited upon passage and by state statute to a reasonable duration and scope. However, this is not such case.[7]

CONCLUSION

Petitioner states that the underlying inquiry to determine compensability under the takings clause is whether

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[7] None of the cases decided after the *Lucas* decision even remotely suggest that the lower courts are having any trouble interpreting Justice Scalia's "loss of value" standard for determination of whether or not, by categorical rule, there is a taking. *See, e.g., Naegele Outdoor Advertising, Inc. v. City of Durham,* 803 F. Supp. 1068 (M.D.N.C. 1992) (although the court found significant economic loss, no taking found where there was no physical invasion and some economic value remained); *Berrios v. City of Lancaster,* 798 F. Supp. 1153 (E.D. Pa. 1992) (court must review economic impact of regulation); *McAndrews v. New Bank of New England,* 796 F. Supp. 613 (D. Mass. 1992) (no taking where "no transfer of wealth from the plaintiff to the public domain"); *Tabb Lakes, Inc. v. United States,* 26 Cl. Ct. 1334 (1992) (evidence of substantial economic activity defeated taking claim); *Fitzgarrald v. City of Iowa City,* 492 N.W.2d 659 (Iowa 1992) (no taking where remaining value for property found); and *Powers v. Skagit County,* 835 P.2d 230 (Wash. Ct. App. 1992) (if regulation merely diminishes economic viability taking inquiry reverts to balancing of interests test, not *Lucas* test). If no showing of "loss of value" is required, the federal courts will find themselves reviewing every garden variety zoning disposition as a "super planning commission". We respectfully suggest that absent such a showing, merely local political issues are raised which should not be reviewed by the federal courts.

"some people bear public burdens which in all fairness and justice, should be borne by the public as a whole," citing *First English*, 482 U.S. at 318. We consider Petitioner's statement paradoxical in the extreme where Petitioner has stipulated to the "fairness and justice" of the ordinance at issue in this case (Defendant's Findings, Nos. 110, 114, 115, 118, 119, 121, 123, 124 and 125; and Plaintiff's Findings No. 47) and has carefully avoided offering any evidence of economic harm. We do, however, agree with Petitioner – and with Professor Sax and Michelman – that the "fairness and justice" standard pervades every case under the Fifth Amendment. Here, however, because that issue was settled in Respondent's favor, the decision of the Minnesota Court of Appeals does not raise an important question of federal law.

For the reasons set forth above, Writ of Certiorari should be denied in this case.

Respectfully submitted,

ROBERT H. FREILICH
RICHARD G. CARLISLE
FREILICH, LEITNER & CARLISLE
4600 Madison, Suite 1000
Kansas City, MO 64112-3012

PIERRE N. REGNIER
JAMES G. GOLEMBECK
JARDINE, LOGAN & O'BRIEN
2100 Meritor Tower
444 Cedar Street
St. Paul, MN 55101

Attorneys for Respondent